

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

OSCAR CHACON,

Petitioner,

v.

No. CV 10-0303 JC/RHS
CR 92-0038 JC

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Petitioner's Petition For Writ Of Audita Querela (CV Doc. 1; CR Doc. 188) filed on March 31, 2010. Petitioner contends that his sentence should be reduced under the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). He specifically asks the Court not to construe the petition as a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. The Court will grant this request because Petitioner has previously filed a § 2255 motion, and a new § 2255 motion would have to be transferred to the Court of Appeals for the Tenth Circuit or dismissed for lack of jurisdiction. *See In re: Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008). The Court assumes *arguendo* that audita querela provides an avenue for the relief that Petitioner seeks.

In the captioned criminal proceeding, Petitioner was indicted and convicted under 21 U.S.C. § 841 for cocaine violations. He was given a life sentence. In 1993 the Court of Appeals for the Tenth Circuit affirmed Petitioner's conviction. *See United States v. Chacon*, No. 92-2212, 1993 WL 408011 (10th Cir. Oct. 14, 1993). Petitioner did not file a petition for writ of certiorari. When the applicable Sentencing Guidelines were later amended, this Court reduced Petitioner's sentence to

three hundred sixty (360) months. He now argues that *Booker* authorizes a further reduction of his sentence.

No relief is available on Petitioner's claims for reduction of sentence under *Booker*. The benefit of the ruling in *Booker* is not available to a defendant on collateral review of a criminal conviction or sentence. The decision applies only to cases that are pending or on direct review. *See Booker*, 543 U.S. at 268; and *see United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *United States v. Price*, 400 F.3d 844, 849 (10th Cir. 2005). As noted above, Petitioner's conviction became final in 1993, and *Booker* was decided in 2005. Petitioner is not entitled to relief under the *Booker* decision, and the Court will dismiss his petition.

IT IS THEREFORE ORDERED that Petitioner's Petition For Writ Of Audita Querela (CV Doc. 1; CR Doc. 188) filed on March 31, 2010, is DISMISSED with prejudice; and judgment will be entered.



SENIOR U.S. DISTRICT JUDGE